

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

ANN AAGAARD, JUDY FISHER, BOB
FISHER, GLEN CONLEY, AND SAVE A
VALUABLE ENVIRONMENT (SAVE),

Petitioners,

v.

CITY OF BOTHELL,

Respondent,

CASE No. 15-3-0001

ORDER FINDING COMPLIANCE

On July 21, 2015, the Board issued its Final Decision and Order (FDO) in this case. The Board found Ordinance 2163 failed to comply with the Growth Management Act (GMA). The Board remanded the Ordinance to the City of Bothell, established a compliance schedule, and entered a determination of invalidity.

On January 27, 2016, the City of Bothell filed its Statement of Compliance with the Board's July 21, 2015, Final Decision and Order. Petitioners' Objections to Finding of Compliance was filed on February 11, 2016. The City of Bothell's Response to Petitioners' Objections to Finding of Compliance was filed on February 22, 2016.

Pursuant to RCW 36.70A.330(1) and (2), the Board conducted a telephonic compliance hearing on March 8, 2016. Board members Cheryl Pflug, Margaret Pageler, and Raymond Paolella attended the hearing. Petitioners were represented by their attorney Allan Bakalian, with Judy Fisher and Bob Fisher also present telephonically. Respondent City of Bothell (hereafter "City") appeared through its attorneys Peter Eglick and City Attorney, Joseph Beck.

I. STANDARD OF REVIEW

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.¹ After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.² The Board's role in compliance proceedings is not identical to that during initial consideration of a Petition for Review. When the Board has identified non-complying provisions of a local jurisdiction's plan or regulations, the jurisdiction "is under an obligation to bring those provisions into compliance and to demonstrate that fact to the Board."³

In the compliance hearing, the burden is on the challenger to establish that the new adoption is clearly erroneous. In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."⁴ Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth.⁵ Thus, during compliance proceedings the burden remains on the petitioner to overcome the presumption of validity and demonstrate that action taken by the City is clearly erroneous in light of the goals and requirements of the GMA.⁶

However, the burden shifts where the Board has entered a determination of invalidity, as in the present case. Under RCW 36.70A.320(4) a city "subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that

¹ RCW 36.70A.300(3)(b).

² RCW 36.70A.330(1) and (2).

³ See RCW 36.70A.300(3)(b) and RCW 36.70A.330; "The issue in compliance proceedings is somewhat different than it is during an original adoption. In compliance proceedings, the Board has identified an area of the local jurisdiction's comprehensive plan or development regulations that do not comply with the GMA. The local jurisdiction is under an obligation to bring those areas into compliance and demonstrate that fact to the Board . . . While the ordinance that is adopted to cure non-compliance is entitled to a presumption of validity, nevertheless, the local jurisdiction must still demonstrate to the Board that it has addressed the area of noncompliance identified in the FDO." *Abenroth, et al. v. Skagit County*, Case No. 97-2-0060c, coordinated with *Skagit County Growthwatch, et al. v. Skagit County*, Case No. 07-2-0002, Order on Reconsideration, at 4-6 (Jan 21, 2009) (emphasis added).

⁴ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

⁵ RCW 36.70A.3201.

⁶ RCW 36.70A.320(2).

1 the ordinance or resolution it has enacted in response to the determination of invalidity will
2 no longer substantially interfere with the fulfillment of the goals of” the GMA. Under *Wells v.*
3 *Western Washington Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 667- 669, 997 P.2d
4 445 (2000), “Where there has been an invalidity determination ... the exception found in
5 subsection (4) *shifts the burden*, on those provisions only, to the local government.”
6 (emphasis added) Thus the City’s actions taken in response to an earlier determination of
7 invalidity “invoke the burden-shifting provisions of RCW 36.70A.320(4)” with respect to
8 fulfillment of GMA goals. *Id.* ⁷
9

10 **DISCUSSION**

11 **The Remanded Issue**

12 Petitioners challenge adoption of Ordinance No. 2163 (2014), which amended the
13 *IMAGINE BOTHELL...* Comprehensive Plan (Comp Plan), revised Subarea Plans, and
14 amended the Bothell Municipal Code (Code) in order to facilitate increased residential
15 development within the North Creek Fish and Wildlife Critical Habitat Protection Area. The
16 Board determined that the City’s action was inconsistent with provisions of its
17 Comprehensive Plan, failed to protect critical area ecosystems from net loss, and
18 substantially interfered with the statutory goal of protecting the environment, including water
19 quality. The Board remanded the Ordinance to be brought into compliance and entered a
20 determination of invalidity. The City appealed the Board’s order to Thurston County
21 Superior Court.⁸
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25 **The City’s Compliance Action**

26 While the superior court appeal was pending, the City adopted Resolution No. 1332
27 (November 24, 2015). As explained by the City Attorney, Resolution 1332 confirms the
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31 ⁷ See also, *Protect the Peninsula’s Future, et al. v. Clallam County*, GMHB Nos. 00-2-0008 and 01-2-0020,
32 Order on Invalidity (May 15, 2015); *Smith, Panesko, Lodge v Lewis County*, GMHB No. 98-2-0011c,
Compliance Hearing Order (July 13, 2000), p. 8.

⁸ Thurston County Superior Court No. 15-2-01577-7.

1 City's compliance with the Board's invalidation decision.⁹ The Resolution establishes that
2 the City's Comp Plan and Code provisions enacted in Ordinance No. 2163 are no longer in
3 effect. In order "to ensure that there is no confusion ... as to what regulations apply...", the
4 Resolution declares that the prior provisions for the subarea are in full force and effect.

5 The superior court appeal was subsequently dismissed. The City Clerk and staff
6 prepared instructions modifying the City's published Comp Plan and Code to remove the
7 changes made by Ordinance 2163 and re-insert the predecessor provisions whose repeal
8 had been invalidated. The City Attorney reviewed and approved the materials and they
9 were forwarded to the Code Publishing Company to publish the revisions.¹⁰ At the time of
10 the compliance hearing, correction of the Code and Comp Plan was very nearly complete.
11 Two days following the compliance hearing, the City reported that "the reversion in relevant
12 provisions to ones that predated Ordinance 2163 has been successfully integrated" into
13 both the official Comp Plan and Code and into the on-line versions as well.¹¹

14 The City asserts that the prior Comp Plan and Code provisions that Ordinance 2163
15 had purported to repeal now again govern in the subarea, and the Board should therefore
16 find that the City is again in compliance.
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20 **Board Analysis**

21 The Petitioners filed a statement of objections to a finding of compliance, questioning
22 whether the City's resolution effectively restored the prior complying plan and regulatory
23 provisions. "Legislative action taken to comply," they argued, requires adoption of an
24 ordinance repealing the non-compliant provisions and enacting compliant legislation.
25

26 Petitioners' objections were resolved at the compliance hearing. First, a resolution is
27 a "legislative action" that satisfies the requirement for city action to overcome a
28 noncompliance ruling by restoring the status quo ante.¹²
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31 ⁹ Declaration of Joseph N. Beck (February 16, 2016), ¶3.

32 ¹⁰ Declaration of Joseph N. Beck (February 16, 2016), ¶7.

¹¹ Letter, Peter Eglick to GMHB, March 10, 2016.

¹² See, e.g., RCW 36.70A.290(7)(a).

1 Second, Resolution 1332 resulted in restoring the Comp Plan and Code provisions
2 that were repealed by the now-invalidated Ordinance 2163.¹³ The Board has previously
3 acknowledged (with some reservations) that savings clauses in invalidated ordinances may
4 support a finding of compliance.¹⁴ Here, the Resolution functions as a savings clause by
5 restoring previously-repealed provisions. By acting to restore the prior provisions for the
6 subarea, the City has ensured that its subarea plan provisions comply with the GMA by
7 protecting sensitive ecosystems and water quality.
8

9 Third, the City implemented Resolution 1332 by documenting Comp Plan and Code
10 reversions. In the Board's decisions considering compliance based on savings/severability
11 clauses, the Board has noted the "ambiguity and doubt" that may arise if repeal and
12 restoration of land use provisions is not clearly documented.¹⁵ Here, the City took
13 legislative action acknowledging that Ordinance 2163 is invalid and directed that the Comp
14 Plan and Code should revert to the form they took prior to Ordinance 2163. This has been
15 accomplished, and the corrected language appears in the official copies and is accessible
16 online. As in *1000 Friends I*, the City could have removed any ambiguity by explicitly
17 repealing the invalidated Ordinance instead of adopting a resolution acknowledging that it is
18 invalid. Nevertheless, the City's resolution is a sufficient legislative action and the City has
19 followed through with measures to insure clarity and certainty.
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22 ¹³ Compliance hearing colloquy: Pflug, "My understanding is that, absent further legislative action by the City,
23 the Comprehensive Plan and Development regulations in effect remain as they were prior to the adoption of
24 Ordinance 2163." Eglick, "I can say, with the City Attorney sitting beside me, categorically yes, that is
25 accurate." Joseph Beck, City Attorney, concurred.

26 ¹⁴ *McVittie v. Snohomish County*, GMHB No. 00-3-0016, Order Rescinding Invalidity and Finding Compliance
27 (August 16, 2001), at 4: "The severability/savings clauses in [the Ordinances], by operation of law, effectively
28 repeal the ordinances found to be invalid by the Board, and revive the prior plan and zoning designations for
29 the area."

30 ¹⁵ See, *1000 Friends I. v. Snohomish County*, GMHB No. 03-3-0019c, Order Granting Reconsideration and
31 Denying Motion to Enter a Determination of Validity (July 22, 2004), p. 8: "Undertaking . . . legislative action
32 [in lieu of sole reliance on a savings clause] would remove any ambiguity or doubt regarding the County's Plan
and zoning designations that existed for the Island Crossing area. Specific legislative action to clearly establish
the designations is important to provide clarity and certainty to the citizens of Snohomish County, since the
maps and designations shown in an Ordinance are more readily apparent and relied upon than a severability
clause which negates those same designations. ... While severability clauses are certainly legal, their practical
effect in the land use context is dubious without follow up legislation to provide clarity and certainty." [Board
declined to rescind invalidity based on severability clause standing alone.]

1 The Board finds and concludes that the City of Bothell has complied with the
2 provisions of the GMA as set forth in the July 21, 2015, Final Decision and Order.

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4 **ORDER**

5 Based upon review of the July 21, 2015, Final Decision and Order, City of Bothell's
6 Statement of Actions Taken to Achieve Compliance and Resolution No. 1332 (2015), the
7 Growth Management Act, prior Board orders and case law, having considered the
8 arguments of the parties offered in the briefing and at the compliance hearing, and having
9 deliberated on the matter, the Board Orders:
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- 11 • By adopting Resolution No. 1332 (2015) acknowledging invalidity of Ordinance
12 2163, removing its provisions and restoring the status quo ante by reinstating
13 prior comprehensive plan policies and development regulations, the City of
14 Bothell **complies** with the provisions of the GMA as set forth in the July 21, 2015,
15 Final Decision and Order.
16 • Case No. 15-3-0001 is closed.
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18 SO ORDERED this 14th day of March, 2016.
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20 _____
21 Cheryl Pflug, Board Member

22 _____
23 Margaret Pageler, Board Member

24 _____
25 Raymond L. Paoella, Board Member

26 **Note: This is a final decision and order of the Growth Management Hearings Board**
27 **issued pursuant to RCW 36.70A.300.¹⁶**
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29 ¹⁶ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
30 parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
31 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days
32 as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be
served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC
242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the
Growth Management Hearings Board is not authorized to provide legal advice.